No. 02-66

Supreme Court, U.S.
FILED
SEP 12 2002
OFFICE OF THE CLERK

In The
Supreme Court of the United States

THE CITY OF FEDERAL HEIGHTS, COLORADO,

Petitioner,

v.

ESSENCE, INC., a Colorado Corporation d/b/a THE BARE ESSENCE, DEVONA RICHELLE LOPEZ and LISA EASTON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STEVEN J. DAWES*
ALENKA J. HAN
LIGHT, HARRINGTON & DAWES, P.C.
Writer Square Office Tower
1512 Larimer Street, Suite 550
Denver, Colorado 80202
(303) 298-1601

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

14 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 2

I. THE TENTH CIRCUIT'S DECISION IS DISCORDANT WITH *LOS ANGELES* 2

II. FEDERAL HEIGHTS' ORDINANCE IS PROPERLY ANALYZED AS A TIME, PLACE, OR MANNER REGULATION 3

III. THE EVIDENCE OFFERED BY FEDERAL HEIGHTS IN SUPPORT OF ITS ORDINANCE WAS MORE THAN SUFFICIENT UNDER THE ANALYIS ADOPTED IN *LOS ANGELES* 6

IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY REJECTING FEDERAL HEIGHTS' EVIDENCE BECAUSE IT DEPRIVED FEDERAL HEIGHTS OF THE OPPORTUNITY TO EXPERIMENT WITH SOLUTIONS 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

Baby Dolls Topless Saloons, Inc. v. City of Dallas, 295 F.3d 471 (5th Cir. 2002) 3

Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) 9

City of Erie v. Pap's A.M., 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) 4, 7, 8

City of Los Angeles v. Alameda Books, Inc., ___ U.S. ___, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) ..... *passim*

Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1985) 3, 5, 7, 8

Reno v. American Civil Liberties Union, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) 4, 5

Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) 8, 9, 10

CONSTITUTIONAL PROVISIONS:

First Amendment to the Constitution of the United States 3, 6

FEDERAL STATUTES:

47 U.S.C. § 223 4

COLORADO STATUTES AND REGULATIONS:

C.R.S. § 12-47-901 5

C.R.S. § 18-13-122 5

TABLE OF AUTHORITIES – Continued

Page

FEDERAL HEIGHTS MUNICIPAL CODE:

Federal Heights, Colo. Code § 12-12-11..... 1

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner, the City of Federal Heights, Colorado, respectfully submits its Reply Brief in Support of its request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit invalidating the age restriction in Federal Heights' adult entertainment ordinance.

STATEMENT OF THE CASE

The City of Federal Heights, Colorado ("Federal Heights"), like many other cities in the United States, adopted a regulatory scheme to diminish the negative secondary effects of adult entertainment establishments on neighborhoods and on the community in general. Sanclub Corporation,[1] which operated The Bare Essence, a live, all-nude dancing establishment, challenged several provisions of Federal Heights' Municipal Code regulating adult entertainment establishments. As is discussed in the Statement of the Case contained in Federal Heights' Petition for Writ of Certiorari, the only provision of Federal Heights' Municipal Code sought to be reviewed by this Court is the provision which seeks to protect those under twenty-one years of age from exposure to alcohol and illicit substances by prohibiting their entry in adult entertainment establishments offering live nude dancing. Federal Heights, Colo.

[1] The Bare Essence, Inc. was substituted for Sanclub Corporation as a plaintiff in this action by the Tenth Circuit.

Code § 12-12-11. (See Petition for Writ of Certiorari, pp. 2 and 7-8.)

REASONS FOR GRANTING THE PETITION

I. THE TENTH CIRCUIT'S DECISION IS DISCORDANT WITH *LOS ANGELES*.

The United States Court of Appeals for the Tenth Circuit's decision pre-dates this Court's opinion in *City of Los Angeles v. Alameda Books, Inc.*, ___ U.S. ___, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). The Tenth Circuit's decision fails to analyze Federal Heights' ordinance according to the test adopted in *Los Angeles, supra,* and contradicts *Los Angeles'* holding. By granting the Petition for Writ of Certiorari, this Court can address and correct these inconsistencies.

Respondents argue that the Tenth Circuit's decision should not be reviewed because the Tenth Circuit reached the correct conclusion when it struck down Federal Heights' age restriction ordinance. They contend, first, that Federal Heights offered "shoddy" research to support the ordinance, which, they claim, fails to establish that the ordinance benefits the community. Second, they argue that, even though the ordinance regulates adult entertainment establishments, it should not be analyzed under the "time, place, and manner" test adopted by this Court and declared applicable to ordinances regulating such establishments. Finally, without any analysis, Respondents state that the trial court's exclusion of evidence gathered by Federal Heights in support of its ordinance was properly affirmed by the Tenth Circuit.

However, as is addressed more fully below, Respondents ignore critical analyses articulated in *Los Angeles,*

supra, and misconstrue the evidence supporting Federal Heights' ordinance. Applying the test adopted in *Los Angeles, supra*, and applied correctly by the United States Court of Appeals for the Fifth Circuit in *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471 (5th Cir. 2002), Federal Heights' ordinance passes First Amendment scrutiny.

II. FEDERAL HEIGHTS' ORDINANCE IS PROPERLY ANALYZED AS A TIME, PLACE, OR MANNER REGULATION.

Federal Heights' ordinance is properly analyzed as a time, place, or manner restriction similar to other municipal regulations governing adult entertainment. This Court has stated that "at least with respect to businesses that purvey sexually explicit materials," regulations governing the speech displayed at such establishments should be analyzed as content-neutral and reviewed under the substantial interest test assessing the time, place, and manner regulation governing the business. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49, 106 S.Ct. 925, 89 L.Ed.2d 29 (1985). This test is properly applied when regulations governing adult entertainment establishments are analyzed. Indeed, contrary to Respondents' implication, both lower courts analyzed Federal Heights' ordinance as a content-neutral time, place, and manner restriction, although the lower courts misapplied the test by increasing Federal Heights' burden beyond that required by this Court.

Even regulations which arguably entirely deprived dancers and patrons of the right to express themselves through nude dancing have been analyzed as time, place and manner restrictions because the municipality's substantial interest in reducing harmful secondary effects

rendered the regulation content-neutral. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000). Such limitations on otherwise expressive speech are tolerated because

> it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate. . . . If States are to be able to regulate secondary effects, then *de minimis* intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based.

City of Erie, 529 U.S. at 294, 120 S.Ct. at 1393-1394.

Respondents contend that the content-neutral, substantial interest test is inapplicable in this case. In support of their contention, they rely upon *Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). In *Reno*, a majority of this Court invalidated portions of the federal Communications Decency Act ("CDA"), 47 U.S.C. § 223, because the statute was overly vague, failed to define critical terms such as "indecent" and "patently offensive", and was a content-based blanket restriction on speech rather than a restriction intended to address the secondary effects caused by the dissemination of "indecent" materials on the internet. *Reno*, 521 U.S. at 867-868, 117 S.Ct. at 2342. Respondents imply that Federal Heights' ordinance suffers from the deficiencies of the CDA discussed in *Reno, supra*, and was therefore properly struck down by the Tenth Circuit.

Federal Heights' ordinance is easily distinguished from the CDA, however. The former is designed and intended to ameliorate the secondary effects caused by the exposure of those below the legal drinking age to an

atmosphere in which alcoholic beverages and illicit substances are readily available, and to reduce crime known to be associated with the presence of adult entertainment establishments. Consumption, service, sale, delivery, and procurement of alcohol by and for those less than twenty-one years are crimes under Colorado statutory law, as is the possession of illegal drugs. C.R.S. §§ 12-47-901 and 18-13-122. Federal Heights intended to further this State interest by limiting these young adults' exposure to alcohol and illicit drugs in places in which alcohol is known to be present and consumed. (See Affidavit of Jennifer Weaver, Appendix E to Petition for Writ of Certiorari, p. App. 64.) Unlike the CDA, Federal Heights' ordinance is tailored to diminish secondary effects, not to act as a primary bar to speech.

Reno, itself, distinguishes the CDA from regulations governing adult entertainment. *Reno* points out that unlike *Renton*'s regulation, "the purpose of the CDA is to protect children from the *primary* effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech." *Reno*, 521 U.S. at 868, 117 S.Ct. at 2342 (emphasis added). In other words, the CDA's *intent* was to limit and restrict an individual's exposure to the offensive speech, and, as such was an impermissible blanket restriction on speech. In contrast, Federal Heights' ordinance, like the ordinance at issue in *Renton*, *supra*, and *Los Angeles, supra*, aimed to reduce other negative effects that are associated with the presence of adult entertainment establishments. Because Federal Heights' age restriction ordinance addresses secondary effects it is content-neutral and is properly analyzed as a time, place, and manner restriction justified by Federal Heights' substantial interest in reducing the stated secondary effects.

III. THE EVIDENCE OFFERED BY FEDERAL HEIGHTS IN SUPPORT OF ITS ORDINANCE WAS MORE THAN SUFFICIENT UNDER THE ANALYSIS ADOPTED IN *LOS ANGELES*.

Federal Heights has "artfully" (See Respondents' Brief in Opposition to Petition for Writ of Certiorari, p. 8.) articulated its substantial interest in diminishing the negative secondary effects of exposing young adults not yet permitted to consume alcohol to situations where drinks and drugs are likely to be present and consumed. Yet, Respondents would have this Court believe that Federal Heights' reasons are simply a ruse designed to sidetrack the Court from the ordinance's actual purpose – "depriving" young adults of their First Amendment right to express themselves and entertain themselves through live nude dancing. Respondents' argument ignores critical analysis adopted by this Court, however.

To advance their argument, Respondents cast the age restriction ordinance as an extreme measure that could deprive any adult of access to adult entertainment. They proceed by equating Federal Heights' ordinance with regulations governing the consumption of alcoholic beverages by minors. (See Respondents' Brief in Opposition to Petition for Writ of Certiorari, p. 5.) Respondents have warped the ordinance beyond its meaning and intention to serve their purpose by characterizing it as an extreme infringement on First Amendment protected speech.

Federal Heights did not choose the age for the restriction out of thin air. Using the State's age limitation for alcohol consumption as a guide, Federal Heights determined that it could best achieve its substantial interest of diminishing young adults' exposure to illicit alcoholic beverages by limiting their exposure to avenues in which alcoholic beverages were likely to be present, most notably

establishments with live nude dancing. Contrary to Respondents' exaggerated assertion, Federal Heights did not randomly choose to "cut off" adults' access to live nude entertainment (See Respondents' Brief in Opposition to Petition for Writ of Certiorari, p. 9.); the age set in the regulation was clearly chosen to correspond *directly* with the age determined by the State to be acceptable for the consumption of alcohol.

Respondents also inarticulately suggest that Federal Heights' justification for the ordinance is specious because it deprives adults of their ability to exercise a constitutional right based upon a restriction limiting alcohol consumption, which is a mere privilege. Yet, this argument, too, fails when analyzed more closely. Federal Heights' ordinance is akin to those regulations discussed in *Renton, supra, Los Angeles, supra,* and their respective progeny and ancestry, in which businesses that deal in sexually explicit materials are limited in the exercise of certain privileges and their patrons thus restricted in their access to certain speech, to accomplish the greater good of protecting the community from the harmful secondary effects caused by these establishments. For example, in *City of Erie, supra*, this Court upheld as constitutional an ordinance that completely banned all live nude dancing. Although all patrons and dancers were thus deprived of their rights to self expression and speech through nudity, this Court upheld the ordinance finding the City of Erie's desire to reduce the harmful secondary effects caused by the presence of live nude dancing establishments justified the ban.

Underlying Respondents' criticism of Federal Heights' justification for the age restriction ordinance is their contention that Federal Heights must produce additional

evidence demonstrating that the ordinance accomplishes its stated goal of minimizing the secondary effects caused by the presence of adult entertainment establishments. However, Respondents have mischaracterized Federal Heights' burden.

Municipalities must be given some latitude to try new solutions to ameliorate the problems brought about by the presence of adult entertainment establishments; "the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city *must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.*" *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 71, 96 S.Ct. 2440, 2453, 49 L.Ed.2d 310 (1976) (emphasis added). Therefore, the specifically tailored evidence sought by Respondents and demanded by the Tenth Circuit will not always be available and is not necessary under this Court's precedents. Indeed, the City of Erie, whose complete prohibition of all nude dancing was upheld, "could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood." *City of Erie*, 529 U.S. at 297, 120 S.Ct. at 1395. The City of Erie was not required to produce studies demonstrating that the prohibition against nude dancing reduced negative secondary effects. Federal Heights should similarly be permitted to rely upon studies showing adult entertainment establishments negatively affect communities.

The evidence offered by Federal Heights at the time it passed the ordinance was remarkably similar to the evidence offered by the City of Los Angeles in support of its ordinance. *Los Angeles,* 122 S.Ct. at 1732. In essence, the City of Los Angeles relied upon a general study that

concluded that "concentrations of adult businesses are associated with higher rates of prostitution, robbery, assaults, and thefts in the surrounding community." *Id.* Nothing in the studies suggested that prohibiting the clustering of adult entertainment establishments in one building would reduce crime and other negative effects. Yet this Court held that the City of Los Angeles had provided sufficient evidence in support of its ordinance, and was required to show the existence of only "a link between concentrations of adult operations and asserted secondary effects." *Id.* at 1735. By requiring more, the Tenth Circuit has demanded more of Federal Heights than this Court requires. This Court should therefore review the Tenth Circuit's ruling.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY REJECTING FEDERAL HEIGHTS' EVIDENCE BECAUSE IT DEPRIVED FEDERAL HEIGHTS OF THE OPPORTUNITY TO EXPERIMENT WITH SOLUTIONS.

Federal Heights attempted to take advantage of the "reasonable opportunity" mandated by *American Mini Theatres, supra,* to explore creative solutions to the problems caused by adult entertainment establishments and underage drinking. *American Mini Theatres,* 42 U.S. at 71, 96 S.Ct. at 2453. Evidence of the ordinance's benefit does not have to be offered contemporaneously with the passage of the ordinance. With the latitude to explore solutions must come the opportunity to collect and offer evidence as it becomes available. See *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). The Tenth Circuit itself acknowledged that evidence of secondary effects caused by the presence of adult entertainment establishments might not become available until "years" after the enactment of the applicable ordinance. (Order of

the Tenth Circuit, Appendix A to Petition for Writ of Certiorari, p. App. 18.) The evidence, when obtained, should therefore be accepted.

Federal Heights offered the Affidavit of Jennifer Weaver only one day after she signed it. The Affidavit confirmed the presence of most, if not all, of the very negative effects which Federal Heights sought to diminish by its ordinance. Thus, Federal Heights offered its additional evidence as soon as it was available and known to the City. The District Court's refusal to consider the Affidavit punished Federal Heights for conducting the very type of inquiry they were permitted and encouraged to conduct by this Court in *American Mini Theatres, supra*. Rejecting the Affidavit constituted reversible abuse of discretion.

CONCLUSION

THEREFORE, Petitioner CITY OF FEDERAL HEIGHTS, COLORADO requests this Court GRANT its Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

STEVEN J. DAWES*
ALENKA J. HAN
LIGHT, HARRINGTON & DAWES, P.C.
Writer Square Office Tower
1512 Larimer Street, Suite 550
Denver, Colorado 80202
(303) 298-1601

Counsel for Petitioner

**Counsel of Record*

September 12, 2002